

No. 10937

IN THE  
United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

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JACK BAGLEY,

*Appellant,*

*vs.*

GEORGE VICE, United States Marshal for the Northern  
District of California, and FRANCIS BIDDLE, Attorney  
General of the United States,

*Appellees.*

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PETITION FOR REHEARING.

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FILED

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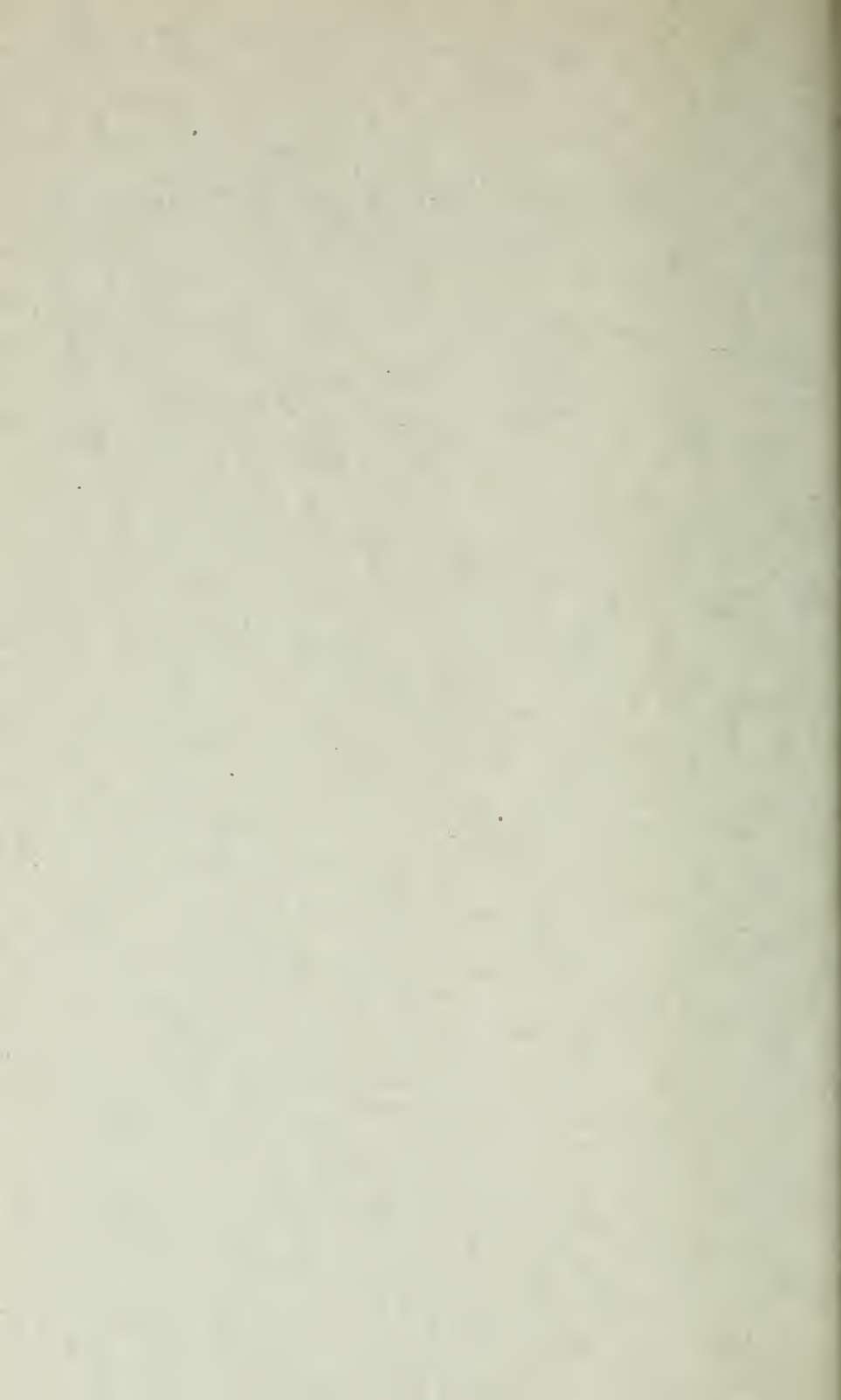
PAUL P. O'BRIEN,  
CLERK

A. L. WIRIN and

J. B. TIETZ,

257 South Spring Street, Los Angeles 12,

*Attorneys for Appellant.*



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The Decisions Relied on by This Court, Cited in the  
Opinion of This Court, Are Not Final. The Cases  
Are Now Pending in the Supreme Court Await-  
ing Final Decision, Certiorari Having Been  
Granted.

In affirming the judgment below, this Court, in an  
opinion more sympathetic to the lot of the sincere con-  
scientious objector at the hands of the law, than any  
other appellate court during this war, seems to have re-

lied heavily upon *United States v. Estep* (C. C. A. 3), 150 F. (2d) 768, and *Smith v. United States* (C. C. A. 4), 148 F. (2d) 288. But on May 28, 1945, and on October 8, 1945, respectively, the Supreme Court granted certiorari in the *Smith* and *Estep* cases respectively. The cases in the Supreme Court bear Supreme Court, October Term, 1945, Nos. 66 and 292, respectively.

The cases were argued in the Supreme Court on November 7.

It is to be noted that the *Estep* case, in the Circuit Court of Appeals, was decided by a 3-2 Court.<sup>1</sup> The appellant has disclosed in his petition for the writ, that he is willing to take all of the administrative steps within the Selective Service System, which *Estep* took. Should the Supreme Court reverse the *Estep* case, and the judgment of this Court become a final in the interim in the instant case, Bagley will again lose his rights because of lack of prescience of what the Supreme Court may now decide.

The sincere conscientious objector ought not thus to lose his rights because of his inability to prophesy what the Supreme Court may decide tomorrow, in a field of law in which neither the lawyers practiced in the law, nor the judges learned in the law (except the Supreme Court Justices), are unable to foretell.<sup>2</sup>

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<sup>1</sup>The penchant for the Supreme Court's adoption of *dissenting* opinions by the Circuit Court judges is now a matter of common knowledge.

<sup>2</sup>Cf. Judge Leahy, dissenting, in *United States v. Estep*, 150 Fed. (2d) 768 (at p. 781), suggesting that *Estep* should not be prejudiced by his lack of "ability to distinguish between *Falbo v. United States* and *Billings v. Truesdell*."

Conclusion.

This Court should, accordingly, grant a rehearing, in order to await the decision of the Supreme Court in the *Smith* and *Estep* cases.

Respectfully submitted,

A. L. WIRIN and

J. B. TIETZ,

By A. L. WIRIN,

*Attorneys for Appellant.*

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Certificate.

I hereby certify that in my judgment the petition for rehearing is well founded and that it is not interposed for delay.

A. L. WIRIN.

